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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRY L. BORTON,

PETITIONER,

VS.

UNITED PARCEL SERVICE, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. If a discharged employee, in a §301 action (29 U.S.C. §185), proves that his Union handled his grievance in a perfunctory manner, is it proper for the Seventh Circuit Court of Appeals to reverse a jury's verdict in the employee's favor because the employee did not also prove by substantial evidence that the Union's acts were egregious and the result of intentional, severe discrimination unrelated to legitimate Union objections?

2. In the absence of a timely post-trial motion tolling the time within which to file the notice of appeal, did the Seventh Circuit Court of Appeals acquire jurisdiction of this appeal if the notice of appeal was filed 102 days after the entry of judgment on the jury verdict?

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I

THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Terry L. Borton, Plaintiff-Appellee, v. United Parcel Service, Inc., Defendant-Appellant, No. 81-1536 (7th Cir., March 9, 1982), rehearing denied June 22, 1982.

Terry L. Borton, Plaintiff, v. United Parcel Service, Inc., Defendant, No. S 79-0274 (N.D.Ind., filed September 28, 1979).[1]

II

STATEMENT OF GROUNDS SUPPORTING JURISDICTION

A. The original judgment in this case was entered on March 9, 1982.

B. The order denying rehearing was entered on June 22, 1982.

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1 The names of all the parties are listed in the caption of the case.

C. It is believed that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

D. The Federal Statute and Rule of Appellate Procedure which this case involves are §301(a) of the Labor Management Relations Act of 1947 and F.R.App.P. 4(a). The Statute and pertinent portions of the Appellate Rule are set out verbatim in the Appendix.

III

STATEMENT OF THE CASE

A. The basis for Federal jurisdiction in the Court of first instance.

Jurisdiction in the Court of first instance was based on §301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. §185(a)).

B. The material facts.

Terry L. Borton (hereinafter

Borton) began working as a driver for United Parcel Service, Inc. (hereinafter UPS) in March, 1976, and was obligated to join the Teamsters Local Union 710 and pay all Union dues.

In the night hours of August 6, 1979, on his return from Toledo, Ohio, Borton was involved in an accident. Prior to the collision, he never saw any lights on the other vehicle which he struck.

The accident was fully investigated by the Indiana State Police, UPS' liability insurance carrier, and two UPS accident investigators. From all the evidence gathered, UPS' Investigator Rutz was unable to form any conclusion as to how the accident happened.

Later, Borton was discharged by UPS, without a written warning, due only to his "involvement in a serious accident," which was contrary to the labor agreement

between UPS and the Teamsters, which required that the accident be caused by Borton's "recklessness" before he could be discharged without first receiving two written warnings.

Upon learning of Borton's discharge, Robert Falco, Teamsters Local 710 Assistant Business Agent, whose territory covers 42 UPS centers and 3,600 employees, met with a UPS representative in Indianapolis, Indiana, to talk about the discharge, and the UPS representative showed Falco selected materials from his file. On his way back to Local 710 headquarters in Chicago, Falco drove by the accident scene. He did not bring any of the UPS documents he had seen back to his boss. Falco did not make a written report of what had been shown to him by the UPS representative.

No other interviews, inquiries or

investigation of any kind were done by the Union prior to the discharge hearing on Borton's grievance except during one long distance telephone conversation initiated by Borton, during which Borton told his Local 710 representative that he did not know how the accident happened because he had not seen any lights or other vehicles immediately prior to impact.

Borton filed his grievance on August 17, 1979, and, on that same day, he was told that his grievance would be heard in Chicago, Illinois, on August 24, 1979, even though the Grievance Committee rules provided for 10 days' written notice before the hearing date. Borton's Local 710 Union Representative did not object to the untimely notice nor did he request more time to prepare for the hearing. Borton was not aware

of the 10-day rule.

On the day of the grievance hearing Borton brought some pictures he had taken of the UPS tractor involved in the accident and some legal authority provided to him by his attorney. Borton met with John Altepeter and Falco for about one-half hour prior to the hearing. Borton gave Altepeter the legal authority but Altepeter refused to use it. Borton then waited for his hearing, which was the seventh hearing held on August 24, 1979.

During UPS' presentation of its case, Borton was not accused of being reckless. Borton asked Altepeter to tell the Grievance Panel about two other UPS employees, Tracey Roose and Delos Stalbaum, who had been involved in serious accidents without being discharged, but Altepeter refused even

though Borton had previously told Altepeter that Stalbaum's accident was similar to Borton's and that Roose's accident involved an allegation of Roose consuming alcohol while on duty and subsequently crashing his rig. No one from Borton's Union attempted to confirm the facts of the Stalbaum and Roose accidents so they could be presented to the Grievance Panel, and Altepeter instructed Borton not to mention them. Borton also again requested Altepeter to mention the legal authority furnished by Borton's attorney but Altepeter declined to do so.

The Grievance Panel voted to uphold the discharge, which was final and binding.

At trial, the UPS manager who fired Borton testified that, in evaluating employee accidents, UPS tries to be

fair and consistent. He, then, explained to the jury the facts surrounding a serious accident involving UPS employee Delos Stalbaum, who rear ended another vehicle on the Indiana Toll Road because he was not paying attention and was not discharged. Stalbaum's accident file was not presented to the Grievance Panel, nor was that of Tracey Roose, whose accident involving apparent drunkenness was also explained to the jury. Roose was not discharged. Indiana State Police Trooper Carter testified at trial that his on-the-scene investigation revealed that Borton had tried to avoid this accident.

Ettore Giovanetti, UPS Regional Labor Manager and a member of Borton's Grievance Panel, testified that the Grievance Panel tries to be fair and that it does make comparisons as to how

different drivers are treated by UPS if such evidence is presented!

On December 18, 1980, a jury returned a verdict in favor of Borton, finding that UPS had breached its labor agreement in discharging Borton and that Teamsters Local 710 had breached its duty of fair representation by its perfunctory handling of Borton's discharge grievance.

No motions were filed under F.R.Civ.P. 50(b), 52(b), 59(b), or 59(e), which would toll or extend the time in which to file a notice of appeal. UPS did not file its notice of appeal until March 30, 1981. On September 8, 1981, Borton filed a motion to dismiss the appeal for lack of appellate jurisdiction, which was denied by the Seventh Circuit Court of Appeals on September 25, 1981.

IV

ARGUMENT

A. The Seventh Circuit Court of Appeals' decision in this case conflicts with the mandate of Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976), by holding that, in this §301 breach of duty case, Barton could only recover if he proved by substantial evidence that his Union's breach of duty was egregious and the result of intentional, severe discrimination unrelated to legitimate Union objectives.

A Union breaches its duty of fair representation if its conduct towards a member is arbitrary, discriminatory or in bad faith, or if a grievance is handled or processed in a perfunctory fashion.

> Vaca v. Sipes, supra, at 916, 917;
> Hines v. Anchor Motor Freight, Inc., supra, at 1058.

In Hines, it was alleged that the

Union breached its duty of fair representation by perfunctorily investigating the company's charges of dishonesty. This Court held in Hines that employees are entitled to offer evidence on that claim, and an erroneous arbitration decision stemming from little or no pre-hearing preparation by the Union will not be allowed to bar the employee from a judicial remedy.

By a preponderance of the evidence, Borton proved that Teamsters Local 710 handled his grievance in as perfunctory a manner as possible save only, perhaps, the failure of the Union to appear at the hearing itself. The Seventh Circuit Court of Appeals held in this case that the evidence adduced at trial and all inferences therefrom were to be construed in favor of upholding the jury verdict for Borton. But, having said

that, the Court, because it used its own erroneous standard, then ignored the evidence and inferences most favorable to Borton, which showed that the other truck, without lights, in the middle of the night, pulled from the shoulder directly into Borton's path. The Court also failed to accord Borton all favorable inferences from the following additional facts:

> Prior to the discharge hearing, Local 710 failed to counsel with Borton or answer his questions; Local 710 failed to continue the hearing one month, despite the fact that they had insufficient time to investigate and prepare Borton's case, and contrary to the 10-day advance notice policy, of which they did not make Borton aware; Local 710 instructed Borton

not to do anything to prepare for the grievance hearing, assured him that it would "handle everything," and then made only the most perfunctory, halfhearted attempt to do so; Local 710 failed to discover, by examining UPS records and documents and interviewing UPS personnel in Indianapolis, the real reason Borton was fired: for involvement in a "serious," "avoidable" accident. The point here is not only that Borton was not guilty of "recklessness" as required under the collective bargaining agreement, but also that UPS never made the determination that he was; Local 710 failed to raise the point that Borton's discharge was not by "proper written notice"; prior to the discharge hearing, Local 710

made no effort to interview the disinterested witnesses who had knowledge of the accident; Local 710 failed to investigate evidence supplied by Borton prior to the grievance hearing of other UPS drivers who had not been discharged for "serious accidents" and whose conduct was arguably no less "reckless" than Borton's. Local 710 prevented Borton from explaining the Stalbaum and Roose accidents to the Grievance Panel by instructing him to say "nothing else" when asked. This was, according to Ettore Giovanetti, UPS' Regional Labor Manager and a member of Borton's Grievance Panel, the type of evidence that could have made a difference had it been presented to the Grievance Panel!

In spite of the foregoing facts, the Seventh Circuit refused to follow this Court's breach of duty test and, instead, held Borton to its own ill-conceived, impossible standard with these words:

> Borton, in order to show a breach of that duty, had to 'adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objections' . . . Nothing less than 'egregious' union misconduct breaches the union's duty.
>
> Borton v. United Parcel Service, Inc., No. 81-1536 (7th Cir. Mar. 9, 1982); (App. p. A5).

Local 710's handling of Borton's grievance was a paragon of perfunctoriness, and the integrity of the grievance hearing was seriously undermined because of it. Borton's discharge was the "industrial equivalent of capital punishment" and, yet, without any investigation

whatsoever, Borton's hearing on his grievance was crammed in with seven other grievances heard the same day as his own, and his Union representative had not even taken the time to read Borton's statement on the UPS accident report until it was already in evidence at the grievance hearing!

On August 24, 1979, Borton was marshalled through the grievance hearing routine, lemming-like, little knowing his fate had been sealed by his Union's total lack of pre-hearing investigation. Borton proved by a preponderance of the evidence that his Union handled his grievance in a perfunctory manner and, accordingly, the Seventh Circuit should not have reversed the jury verdict in favor of Borton.

Not only is the Seventh Circuit's decision in this case inconsistent with

this Court's decisions in Vaca v. Sipes, supra, and Hines v. Anchor Motor Freight, Inc., supra, but it is also inconsistent with its own prior decisions. Before the Seventh Circuit's ill-conceived decision in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), it followed this Court's test for determining whether a Union had breached its duty of fair representation. Four years ago, the Seventh Circuit held that a Union breached its duty of fair representation when it acted arbitrarily, discriminatorily or in bad faith. There was no requirement of showing invidious hostility or malice before it could be said that the Union breached its duty of fair representation.

> Baldini v. Local Union No. 1095, UAW, 581 F.2d 145 (7th Cir. 1978).

Two years later, the Seventh

Circuit reaffirmed that the duty of fair representation may be breached without a showing of scienter on the Union's part. The Seventh Circuit stated then:

> As Professor Gorman has noted, the relevant inquiry is not 'whether the union in fact pursues an employee's grievance,' but rather 'whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments and has refuted insubstantial arguments by the employer.' R. Gorman, supra note 11, at 718. Absent such action by the union, the arbitration process could become little more than a sham, and the rationale behind deference to the decisions of arbitration panels could be entirely undercut. '[A]dministration and grievance adjustment are performed by the union at a much lower "level of visibility" and generality than contract negotiation, and are thus more readily subject to "manipulation" by a willful union and more readily garbed with appearances of good faith or mere carelessness . . . .' Id. at 719. See also Vaca v. Sipes, supra, 386 U.S. at 182, 37 S.Ct. at 912; Holodnak

v. Avco Corp., 381 F.Supp. 191, 199-201 (D.Conn. 1974), modified on other grounds, 514 F.2d 285 (2d Cir. 1975).

> We note also that the duty of fair representation is of special importance when a grievance for wrongful discharge is involved. As the Fourth Circuit said, 'A Union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge -- the industrial equivalent of capital punishment.' Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

Miller v. Gateway Transp. Co., Inc., 616 F.2d 272, 277, n. 12 (7th Cir. 1980).

Then, in a startling departure from these prior well-accepted and correct decisions, the Seventh Circuit in 1981 held that a Union breaches its duty of fair representation only if it can be shown by substantial evidence that the Union was guilty of fraud, deceitful action or dishonest conduct -- a near impossible burden.

Hoffman v. Lonza, Inc., supra.

Although he concurred in the result reached in the Hoffman case, Judge Cudahy, in his concurring opinion, cogently pointed out that the opinion had clearly run afoul of the Seventh Circuit's own prior decisions and prior decisions of the United States Supreme Court by superimposing a new and unwarranted burden of proof on an employee to establish a breach of the Union's duty of fair representation.

In its most recent encounter with a §301 suit, the Seventh Circuit, in Cote v. Eagle Stores, Inc., 110 LRRM 2775 (7th Cir. June, 1982), cited Vaca v. Sipes, supra, then ignored its test and proceded to agonize over whether the Union's conduct was to be judged by the test it set forth in Baldini v. Local

Union No. 1095, UAW, supra or the new test it devised in Hoffman v. Lonza, Inc., supra. In Cote, the Seventh Circuit opted to follow its Hoffman standard, which, it said, required a showing that the Union acted in a deliberate, severely hostile, irrational and invidious manner.

The confusion existing in the Seventh Circuit as to the standard to be applied in a §301 suit is further exemplified by Rupe v. Spector Freight Systems, Inc., 679 F.2d 685 (7th Cir. 1982). Once again, the majority in Rupe followed the Hoffman v. Lonza, Inc., supra, standard in derogation of the standard established by this Court in Vaca v. Sipes, supra. The dissent in Rupe, by Judge Swygert, chastised the majority for failing to give proper judicial deference to the jury's verdict

and for refusing to apply this Court's perfunctory test.

The Seventh Circuit's Hoffman v. Lonza, Inc. standard, as applied to Borton's breach of duty claim, is at odds with the decisions in other Circuits which have been faced with §301 claims.[2]

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2 DeArroyo v. Sindicato de Trabajadores Packing AFL-CIO, 425 F.2d 281, 285 (1st Cir. 1970) (failure to investigate a grievance was arbitrary and perfunctory conduct); Schum v. South Buffalo Ry. Co., 496 F.2d 328, 330 (2nd Cir. 1974); Riley v. Letter Carriers Local No. 380, 668 F.2d 224, 228 (3rd Cir. 1981); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Sanderson v. Ford Motor Co. 483 F.2d 102, 110 (5th Cir. 1973); Ruzika v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975); Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir. 1980) (specifically rejecting the notion that fraud or deceitful Union conduct need be shown to establish a Union's breach of duty of fair representation); Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978); Patterson v. Tulsa Local No. 513, 446

The Seventh Circuit's treatment of §301 breach of duty cases is in a state of utter chaos as its decisions on this point are both in agreement with and contrary to this Court's decisions and the decisions from other Circuits. Litigants in the Seventh Circuit now, apparently, have no remedy if their Union acts arbitrarily or perfunctorily in handling their grievance, even when their grievance is over an alleged wrongful discharge, as it was in the instant case. Discharged employees who file a §301 suit in the

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F.2d 205, 210 (10th Cir. 1971), but see Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973), which implies that proof of fraud and deceit is also required to establish a Union's breach of duty of fair representation; American Postal Workers Union, AFL-CIO, Headquarters Local 6885, et al. v. American Postal Workers Union, AFL-CIO, 665 F.2d 1096, 1105 (D.C.Cir. 1981).

Seventh Circuit deserve to be treated the same as litigants in other Circuits. Terry Borton proved by a preponderance of the evidence that his Union handled his grievance perfunctorily. The jury agreed with him, and the Seventh Circuit acted contrary to this Court's decisions in Vaca v. Sipes, supra and Hines v. Anchor Motor Freight, Inc., supra, when it held that Borton had not proved breach of duty because he had not proven by substantial evidence that the Union's breach of duty was egregious, the result of intentional severe discrimination unrelated to legitimate Union objectives -- a burden of proof that, for all practical purposes, relegates an individual's §301 remedy in the Seventh Circuit to the judicial junk pile.

B. The Seventh Circuit Court of Appeals lacked jurisdiction to hear this appeal because the notice of appeal was filed 102 days after entry of judgment

on the jury verdict, and no post-trial motion tolling the time within which to file the notice of appeal had been filed.

After the jury's verdict, UPS was given until January 26, 1981, to file post-trial motions and briefs. However, no post-trial motions tolling the notice of appeal limitations were ever filed pursuant to F.R.Civ.P. 50(b), 52(b), 59 (b) or 59(e). The notice of appeal was not filed until March 30, 1981.

On January 14, 1981, Borton filed his objection to motion for extension of time for filing notice of appeal beyond that allowed by Court Rule.

F.R.App.P. 4(a)(5) limits the extension of time to file the notice of appeal to a maximum of 30 days in the absence of pending motions under F.R. Civ.P. 50(b), 52(b) or 59. See F.R. App.P. 4(a)(4).

Under F.R.App.P. 4(a)(1), the time to file a notice of appeal expired on or about January 19, 1981. Since no timely post-trial motion was filed to toll the notice of appeal time limitation pursuant to F.R.App.P. 4(a)(4), the longest the District Court could have extended the time for filing a notice of appeal was until on or about February 18, 1981. The notice of appeal was not filed until March 30, 1981.

This Court demands strict adherence to the jurisdictional requirements in connection with perfecting an appeal.

> United States v. Robinson, 361 U.S. 220, 80 S.Ct. 282 (1960).

The Seventh Circuit Court of Appeals lacked jurisdiction to hear this appeal for failure of UPS to comply with the technical requirements of F.R.App.P. 4(a).

V

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for certiorari and enter an appropriate order.

Respectfully submitted,

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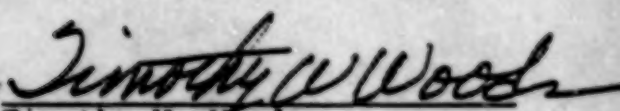
By 

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